



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hollingsead International

File: B-227853

Date: October 19, 1987

DIGEST

1. Protest of extensions of time for submission of proposals and of solicitation delivery schedule is untimely since extensions were incorporated into the solicitation by amendments and thus were required to be protested prior to the next closing date after their incorporation.
2. Although solicitation warned that offers failing to meet required delivery schedule would be considered nonresponsive and rejected, such a provision does not require agency to automatically reject a nonconforming proposal in the same manner that it would reject a nonresponsive bid.
3. Agency decision to waive a requirement for submission of complete design information before award was reasonable since neither of the two offers submitted provided the required information.
4. Although generally a written amendment should be issued when the agency relaxes or changes its requirements, the protester is not prejudiced by the agency's failure to issue a written amendment since neither the protester or the awardee met the waived requirement.
5. General Accounting Office generally will not disturb an agency's technical evaluation absent a clear showing that the determination was unreasonable. A protester's mere disagreement with an agency's technical evaluation does not satisfy its burden to show that the evaluation was unreasonable.

DECISION

Hollingsead International protests the award of a contract to Technology, Inc., under request for proposals (RFP) No. N00228-86-R-4021, issued by the Navy for avionics racks for the S-3A/S-3B aircraft. We dismiss the protest in part and deny it in part.

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BACKGROUND

The solicitation was issued on February 13, 1986, for 72 avionics racks, plus two first articles, technical data, installation, and an option quantity of 100 racks. The racks were to be similar to existing Lockheed avionics racks, but with a number of design changes. At section 4.1, the solicitation required the submission, prior to award, of a "complete proposal design package including drawings, assigned part numbers for replaceable components, prior testing results and stress analyses." Before initial proposals were due, the Navy issued five amendments, which, among other things, extended the date for submission of initial proposals and changed installation to an option item.

On the April 28 closing date two proposals were received; one from Hollingsead at \$4,916,865 and one from Technology at \$2,435,814. Both proposals were judged acceptable by the technical evaluation panel although the evaluators concluded that neither proposal met the requirement of section 4.1 for a complete proposal design package. According to the technical evaluation panel, Hollingsead's proposal included some design information but much of it was incomplete, misleading or irrelevant. Nonetheless, the evaluation team concluded that Hollingsead understood the solicitation requirements. The technical evaluators found that Technology submitted no design data but concluded that the firm's proposal also indicated that Technology has the capability to meet the requirements. Based on the recommendation of the technical evaluation panel the agency decided to waive the preaward design requirement and to allow the awardee to submit the information under the contract since both proposals were otherwise acceptable.

On September 2, a Navy contract negotiator informed Hollingsead by telephone that the firm's proposal was technically acceptable but explained that there were deficiencies in the firm's proposal design package. The Navy says, and Hollingsead confirms, that the firm was also told that no further design information was required at that time.

Price negotiations were conducted with both firms and best and final offers were requested on October 9 and submitted on October 16. The best and final offers were \$2,206,402, for Technology and \$4,213,404, for Hollingsead. During a review of the proposals, the agency contract review board discovered that Technology proposed a delivery schedule that did not meet the schedule set out in the solicitation. For example, Technology's proposed schedule allowed 210 days after award for delivery of first articles instead of the

required 90 days, allowed 300 days after delivery of the first articles for delivery of production items instead of the required 180 days and provided for an extended schedule for exercise and performance of the options for installation and for the additional quantity. According to the Navy, contracting officials had not previously noticed the schedule discrepancy. The activity that was to use the racks decided, however, that the extended schedule was satisfactory.

Thus, since Technology's schedule met the using activity's requirements, the contracting officer decided to extend the required schedule to match that proposed by Technology. On the morning of October 21, a Navy contract negotiator telephoned Hollingsead and informed the firm of the new schedule and asked for a revised price. According to the Navy's contract negotiator, during the phone call to Hollingsead, he established a deadline of 4:00 p.m., that day for Hollingsead's revised best and final offer. Hollingsead, however, says that it was told its revised proposal was due by 2:00 p.m. In any event, Hollingsead responded at 2:00 p.m. and did not change its offer.

On December 12, the Navy awarded the contract to Technology at a total price of \$810,472, without options, and informed Hollingsead of the award. On December 31, Hollingsead requested a debriefing and filed a Freedom of Information Act (FOIA) request for a copy of Technology's contract including a copy of the final statement of work. A debriefing was held on January 20, 1987, followed by two additional FOIA requests by the protester, several agency responses to those requests and finally by the protest to this Office.

THE PROTEST

Hollingsead states generally that the Navy incorrectly evaluated the proposals and failed to follow the solicitation's evaluation criteria by awarding a contract to a less qualified firm. More specifically, Hollingsead protests the Navy's extensions of the due date for initial proposals, the oral October 21 request for revised best and final offers without allowing sufficient time for the protester to properly review its offer, and without providing for a common cut-off date. The protester also objects to the extensions of the delivery schedule which resulted in the

October 21 request.^{1/} Hollingsead says that the agency's failure to inform it earlier of the delivery schedule extension violated the agency's duties to fairly consider its proposal, to adequately communicate its needs and to conduct meaningful discussions. Further, Hollingsead argues that, under the terms of the solicitation, Technology's initial proposal should have been summarily rejected since it proposed a longer delivery schedule than allowed by the solicitation. Hollingsead also maintains that the solicitation's preaward proposal design requirement was waived only for Technology since Hollingsead responded to the requirement while Technology provided no information at all. The protester states that it submitted all of the required design information but the agency must have lost part of its proposal that addressed those requirements.

TIMELINESS

Hollingsead's arguments regarding the extensions of time for submission of initial proposals, as well as those concerning the agency's request for a revised best and final offer based on the delivery schedule extensions are untimely. Under our Bid Protest Regulations, protests that are based on alleged solicitation improprieties which are apparent on the face of the solicitation or which are incorporated into the solicitation, must be protested prior to the closing date for receipt of proposals or prior to the next closing date following their incorporation. 4 C.F.R. § 21.2(a)(1) (1987). Here, the closing date for initial proposals was extended by solicitation amendments dated March 7, March 25, and April 4, 1986. Since Hollingsead did not protest the extensions contained in the amendments until June 15, 1987, more than 13 months after the final April 28, 1986, closing date for initial proposals, these protest grounds are untimely and will not be considered. McDonald Welding and Machine Co., Inc.--Request for Reconsideration, B-224014.2, Sept. 5, 1986, 86-2 CPD ¶ 269.

The delivery schedule stretchouts the protester complains of occurred on October 9, when installation was changed to an option item and the exercise dates of other option items were extended, and on October 21, when Hollingsead was orally informed of the extended performance schedule for all items. Hollingsead was required to protest these issues before the next closing date after those schedule changes

^{1/} The protester states that it was first informed in a October 9 letter from the Navy that changes had been made in the dates some of the option items were to be exercised. All the schedule changes including those relating to the options were incorporated into the October 21 request.

were communicated to it.^{2/} 4 C.F.R. § 21.2(a)(1); McDonald Welding and Machine Co., Inc.--Request for Reconsideration, B-224014.2, supra. Since the protest was not filed until 8 months after the final closing date, these contentions also are untimely and will not be considered. The same rationale applies to the protester's contentions that the October 21 request should have been in writing and that the protester should have been given more time to revise its price when the delivery schedule was extended on October 21; Hollingsead could have protested then but chose not to do so until June 15, 1987. Thus, these arguments are also untimely. Id.

The protester argues that even if untimely, we should consider these arguments under the "significant issue" exception to our timeliness rules. 4 C.F.R. § 21.2(c). Our Office invokes the "significant issue" exception to our regulations sparingly so that our timeliness rules do not become meaningless. Pembroke Machine Co., Inc., B-227360, June 11, 1987, 87-1 CPD ¶ 588. We will consider an otherwise untimely issue where the protest raises an issue of first impression that would have widespread significance to the procurement community. Diversified Computer Consultants, B-225714.2, June 14, 1987, 87-1 CPD ¶ 613. These protest issues do not meet this standard. We do not believe that allegations concerning the extension of proposal due dates and of a delivery schedule in this particular procurement constitute issues of widespread interest to the procurement community at large.

DELIVERY SCHEDULE

Hollingsead argues that the Navy should have summarily rejected Technology's initial proposal because it included a delivery schedule longer than that allowed by the solicitation. It also objects to the agency's failure to provide

^{2/} Although Hollingsead says it did not protest the October 21 delivery schedule extension earlier because it did not know the circumstances surrounding the extension until June 1987, the protester admits that when the schedule was amended, it was aware that the new delivery schedule involved "major changes" requiring a different pricing structure and that it would not have sufficient time to properly amend its proposal. Thus, the impact of the schedule extension was immediately clear but Hollingsead chose not to protest until 8 months later.

for a common cut-off date in its October 21 request for revised proposals based on the schedule revision.^{3/}

The solicitation stated that an offer which proposes a delivery schedule that does not fall within the required delivery period would be rejected as "nonresponsive." Normally, in negotiated procurements, proposals are not rejected for nonresponsiveness as are bids in sealed bid procurements. Scan-Optics, Inc., B-211048, Apr. 24, 1984, 84-1 CPD ¶ 464. The term can, however, be used in an RFP to refer to requirements that are so material that a proposal failing to conform to them would be considered unacceptable. Even under those circumstances, however, an agency should not automatically reject a nonconforming proposal in the same manner that it would reject a nonresponsive bid. It is a fundamental purpose of negotiated procurements to determine whether deficient proposals are reasonably susceptible of being made acceptable through discussions. Id. Thus, although Technology's proposal did not offer the required delivery schedule, the Navy did not have to summarily reject the proposal. Fort Wainwright Developers, Inc., et al., B-221374, et al., May 14, 1986, 86-1 CPD ¶ 459. In fact, contracting officials later determined that the extended delivery schedule proposed by Technology met the agency's requirements and the solicitation was orally amended and Hollingsead was given an opportunity to revise its price based on the new schedule. Under these circumstances, the agency was not required to reject Technology's initial proposal.

Hollingsead also argues that the two offerors were not subjected to a common cut-off date for receipt of the best and final offer requested as a result of the delivery schedule change. Since the Navy already had Technology's price on the extended delivery schedule, a revised price was requested from Hollingsead on October 21, but not from Technology. We fail to see how the protester was prejudiced by the Navy's failure to permit the awardee an opportunity to further revise its proposal.

3/ These portions of Hollingsead's argument concerning the delivery schedule appear to be timely because the protester was first provided with the awardee's complete proposal and other information in a May 29 Navy response to one of the protester's FOIA requests. That information showed that the awardee proposed the extended schedule and that the awardee's best and final proposal was submitted prior to October 21.

DESIGN INFORMATION

Hollingsead also argues that the Navy should not have waived the requirement for preaward design information and that in any event, a written amendment should have been issued to waive the requirement. Under the circumstances here, we have no basis upon which to object to the Navy's decision to waive the preaward design information requirement since neither offeror provided the complete information required by section 4.1. AT&T Communications, 65 Comp. Gen. 412 (1986), 86-1 CPD ¶ 247. In this respect, although the evaluation panel determined that Technology's proposal demonstrated the firm's capability to meet the agency's requirements, they also found that Technology did not submit the design information requested by section 4.1. Nonetheless, as Hollingsead admitted to a Navy contract negotiator on September 2, 1986, the protester also did not submit complete design information such as stress analysis and testing results on a completed avionics rack.^{4/} Further, we find unpersuasive the protester's argument that it was prejudiced by the waiver because it submitted at least some of the information required by section 4.1 while Technology submitted none. It appears from the record that the agency evaluators considered both proposals deficient in this area. We do not believe that it is significant that one firm was deficient because it failed to respond while the other was deficient because its response was unacceptable. Although the agency should have issued a written amendment to notify all offerors of the waiver of the design information requirement, Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.606(a) (1986), Hollingsead was not prejudiced by the agency's error since neither offeror met the preaward design requirements. DataVault Corp., B-223937, et al., Nov. 20, 1986, 86-2 CPD ¶ 594.

^{4/} Although Hollingsead says that contracting officials lost part of its technical proposal that included information that would have satisfied the design information requirement, Hollingsead's own notes on the September 2, 1986, discussions with the agency show that the firm admitted that it had not submitted complete information. Further there is no indication that at that time the protester complained that the deficiencies that the agency discussed with it were the result of "lost" information. Hollingsead's contention now that those requirements were not met simply because the agency lost a portion of its proposal is unconvincing.

AWARD TO TECHNOLOGY

Hollingsead generally argues that the contracting officer abused his discretion by selecting Technology for award. The protester does not challenge the agency's technical evaluation but merely argues that it is more capable of meeting the Navy's needs and argues that Technology is not qualified to complete the project. The agency determined that both firms submitted technically acceptable proposals and made award to Technology as the low offeror in accordance with the terms of the solicitation. Our Office generally will not disturb an agency's conclusion that a proposal is technically acceptable absent a clear showing that the determination is unreasonable. See East Norco Joint Venture et al., B-224022 et al., Jan. 5, 1987, 87-1 CPD ¶ 6. Here, the protester's mere disagreement with the agency's conclusion that the awardee's proposal is technically acceptable does not satisfy this requirement. Id.

Hollingsead's contention that Technology is not capable of meeting the agency's requirements is a challenge to the Navy's affirmative determination of the awardee's responsibility. CORE International, Inc., B-225640, Jan. 21, 1987, 87-1 CPD ¶ 78. We do not review protests concerning affirmative determinations of responsibility absent a showing that contracting agency personnel acted fraudulently or in bad faith or that definitive responsibility criteria contained in the solicitation were not met. 4 C.F.R. § 21.3(f)(5); E.H. Pechan & Associates, Inc., B-225648, Feb. 17, 1987, 87-1 CPD ¶ 176. Neither is alleged here.

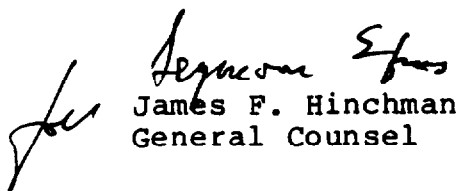
Finally, Hollingsead's allegation that Technology may infringe its patents serves as no basis for objection to the award since patent infringements are not encompassed within our bid protest function. University of Dayton Research Institute, B-220589, Jan. 30, 1986, 86-1 CPD ¶ 108.

OTHER ALLEGATIONS

In its comments on the agency's report, for the first time Hollingsead argued that Technology's initial proposal should have been rejected because it did not propose installation of the racks at the locations listed in the solicitation or that the racks include an elastomeric isolator mechanism as required. These allegations must independently satisfy our timeliness regulations, which require the filing of a protest within 10 working days after the basis of protest was known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). These allegations are based on Technology's initial proposal, which was mailed to Hollingsead on June 29, 1987, in response to the firm's FOIA

request. We assume that Hollingsead received the FOIA response within 1 calendar week of its mailing. Adrian Supply Co.--Reconsideration, B-225472.3, Mar. 23, 1987, 87-1 CPD ¶ 328. Counting the 10 working days from July 6 (1 week after June 29), the protest should have been filed by July 20. Hollingsead's protest based on information in the FOIA response was not filed until July 30 with its comments on the agency report and, therefore, was untimely and not for consideration. 4 C.F.R. § 21.2(a)(2); Newport News Shipbuilding and Dry Dock Co., B-221888, July 2, 1986, 86-2 CPD ¶ 23.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel